DOCUMENT RESUME

ED 451 599 EA 030 942

AUTHOR	Gittins, Naomi E., Ed.
TITLE	Mitchell v. Helms: Implications for Vouchers.
INSTITUTION	National School Boards Association, Alexandria, VA. Council of School Attorneys.
ISSN	ISSN-1069-0190
PUB DATE	2000-12-00
NOTE	10p.; Published bimonthly. Theme issue.
AVAILABLE FROM	National School Boards Association Council of School Attorneys, 1680 Duke Street, Alexandria, VA 22314-3493 (subscription $120 per year). Tel: 703-838-6722; Web site: http://www.nsba.org/cosa.
PUB TYPE	Collected Works - Serials (022).
JOURNAL CIT	Inquiry & Analysis; Dec 2000
EDRS PRICE	EDRS Price MF01 Plus Postage. PC Not Available from EDRS.
DESCRIPTORS	*Discipline; *Educational Vouchers; Elementary Secondary Education; *Homophobia; *Homosexuality; *Internet; Public Schools; *Religion; School Districts; Sexual Orientation

ABSTRACT

This issue deals with the Supreme Court's recent decision in "Mitchell v; Helms" that is viewed by many as additional legal fire power for voucher proponents in the battle over the constitutionality of such programs. The discussion attempts to sort out how the High Court's decision may affect the future of voucher programs. Specifically, the Court clearly rejected the respondent's position that it is unconstitutional to divert direct aid to religious purposes. Other articles deal with the premature announcement that vouchers help African-American students, whether schools can discipline students for their Web sites, and whether the Boy Scouts should be allowed access to school facilities. (DFR)

Reproductions supplied by EDRS are the best that can be made
from the original document.

Mitchell v. Helms: Implications for Vouchers.

Naomi E. Gittins, Editor

Inquiry & Analysis
December 2000

ED 451 599

U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)
✓ This document has been reproduced as received from the person or organization originating it.
☐ Minor changes have been made to improve reproduction quality
• Points of view or opinions stated in this document do not necessarily represent official OERI position or policy

PERMISSION TO REPRODUCE AND DISSEMINATE THIS MATERIAL IN MICROFICHE ONLY HAS BEEN GRANTED BY
D. Gray
TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)
2B

EA 030 942

BEST COPY AVAILABLE

Inquiry & ANALYSIS

A MEMBERSHIP SERVICE OF THE NSBA COUNCIL OF SCHOOL ATTORNEYS

December 2000

Vouchers 1-3

For the Board–
Student Web Sites 4

Facilities Use 5

Federal News: EEOC Guidance on
Howee Benefits 6

Chairman's Notes 6

PERMISSION TO REPRODUCE AND DISSEMINATE THIS MATERIAL IN MICROFICHE ONLY HAS BEEN GRANTED BY

D. Gray

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

2B

National School Boards Association's Council of School Attorneys
1680 Duke Street,
Alexandria, VA 22314-3493
(703) 838-6722
Fax: (703) 548-5613
Info-FAX: 1-800-809-COSA (2672)
E-mail: cosainfo@nsba.org
Web site: http://www.nsba.org/cosa

·NSBA·

MITCHELL V. HELMS: IMPLICATIONS FOR VOUCHERS

The Supreme Court's recent decision in *Mitchell v. Helms*, 120 S. Ct. 2530 (2000), is viewed by many as additional legal fire power for voucher proponents in the battle over the constitutionality of such programs. But does *Mitchell* really assure victory for vouchers? The discussion below attempts to sort out how the High Court's decision may affect the future of voucher programs.

The *Mitchell* decision disappointed those who believe that public funds allocated for education should be spent only to improve public education. Specifically, the Court clearly rejected the respondent's position that it is unconstitutional to divert direct aid to religious purposes. Astoundingly, the plurality reduced what was once complex establishment clause analysis, to one question—neutrality. Justice Thomas expressed the plurality's "near-absolute" position as follows: "If the religious, irreligious and areligious are all alike eligible for government aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government. . . . [I]f the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who adequately further that purpose, then it is fair to say that any aid going to a religious recipient only has the effect of furthering that secular purpose." *Id.* at 2541.

The plurality's analysis seems to assure that a voucher program that distributes funds in an evenhanded manner will pass constitutional muster even where such funds are used to pay for religious education at pervasively sectarian schools. However, several factors temper the decision's significance for future voucher litigation. First, the *Mitchell* decision focused exclusively on whether Chapter 2 had the primary effect of advancing religion; the issue of whether the federal aid program had a secular purpose was not disputed. It is unlikely that this latter issue will be similarly conceded in other legal controversies involving vouchers given that the religious purpose behind voucher legislation is often vigorously contested.

. . . only a minority of the current Court would. . . decide the constitutionality of vouchers, using the neutrality standard alone.

Second, only four justices espoused the singular neutrality standard. Two other justices concurred with the judgment but indicated that public aid to private school programs is not constitutionally justified using this standard alone. In fact, the concurring opinion, written by Justice O'Connor, stressed that actual diversion of public aid to religious purposes was unconstitutional but, in this case, there was only minimal evidence that such a diversion had occurred. O'Connor also made it clear that, in her view, the Court should not treat per capita aid programs (such as Chapter 2) the same as "true private-choice" programs. Even if one accepts that voucher programs entail private choice,

Continued on page 2

Inquiry & ANALYSIS

A Membership Service of the NSBA Council of School Attorneys

Naomi E. Gittins, *Editor and Staff Attorney*

NSBA Council of School Attorneys

Martin Semple, *Chairman*

Cynthia Lutz Kelly, *First Vice Chairman*

Margaret A. Chidester, *Second Vice Chairman*

Nancy Fredman Krent, *Secretary*

NSBA's Office of General Counsel and Office of Constituent Services provide professional and executive staff support to the Council and its varied programming for school attorneys and school leaders nationwide.

Clarice L. Chambers, *NSBA President*

Anne L. Bryant, *NSBA Executive Director*

Harold P. Seamon, *NSBA Deputy Executive Director*

Don E. Blom, *Associate Executive Director, Constituent Services*

Susan R. Butler, *Director, Council of School Attorneys*

Lyndsay Andrews, *Manager, Legal Services*

Julie Underwood, *General Counsel*

Edward C. Darden, *Senior Staff Attorney*

Julie E. Lewis, *Staff Attorney*

Thomas Burns, *Legal Assistant*

ABOUT THE NSBA COUNCIL OF SCHOOL ATTORNEYS

Formed in 1967, the NSBA Council of School Attorneys provides information and practical assistance to attorneys who represent public school districts. It offers legal education, specialized publications, and a forum for exchange of information, and it supports the legal advocacy efforts of the National School Boards Association.

Inquiry & Analysis is a membership service of the Council, or can be purchased by subscription for $120 per year.

Copyright© 2000 by the National School Boards Association. All Rights Reserved.
ISSN: 1069-0190

Continued from page 1

O'Connor's caveat indicates that only a minority of the current Court would be disposed to decide the constitutionality of vouchers, using the neutrality standard alone.

Justice O'Connor's concurrence points instead to *Witters v. Washington Dep't of Social Services for the Blind*, 474 U.S. 481 (1986), and *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993), in which aid to religious education was found to be constitutionally acceptable by virtue of individual private choice. But opponents contend that these two cases do not support vouchers because there is no true "choice" in voucher schemes where the vast majority of private schools available are religious ones. *See Simmons-Harris v. Zelman*, 72 F. Supp.2d 834, 847 (N.D. Ohio 1999), *appeal heard*, 6th Cir. June 20, 2000 (finding Cleveland voucher program had primary effect of advancing religion based partly on fact that 82% of participating schools are religiously affiliated). In addition, these voucher programs involve direct cash aid that often helps pay for religious instruction, even though ostensibly parents "decide" where to spend it. Finally, as in *Mitchell*, the secular purpose of the aid program was not disputed in either *Witters* or *Zobrest*.

Resolution of public aid to religion cases "requires courts to draw lines, sometimes quite fine, based on the particular facts of each case." This means that ultimately decisions may turn on who is drawing the lines. The Court's composition may well shift within the next few years, making the outcome of any voucher case the Court might hear hard to predict.

OTHER VOUCHER ACTIVITY

Court Action

- **Holmes v. Bush**—A Florida state appeals court ruled that the statewide Opportunity Scholarship Program which provides vouchers to students who attend poorly performing public schools does not violate the state constitutional provision mandating a "free education through a system of public schools."
- **Simmons-Harris v. Zelman**—U.S. Court of Appeals for the Sixth Circuit heard arguments in June over the constitutionality of the voucher program in Cleveland, Ohio. The district court ruled that the program violated the Establishment Clause but stayed its order pending appellate review.

Political Initiatives

- **California**—Voters soundly rejected Proposition 38, a constitutional amendment that would give parents $4000 to use toward private, including religious, education. The amount would increase if the state were to spend in excess of $8000 per pupil in public education. Initially available only to parents for children entering kindergarten or who attended a public school the previous year, the vouchers would eventually be available for all children attending K-12 at a private school.
- **Michigan**—Voters said no to an initiative known as, "The Kids First! Yes!", which would repeal a 1970 amendment to the state constitution prohibiting public aid to religious schools. Proposition 1 would mandate vouchers to all students in seven districts with low graduation rates and would make it possible for vouchers and tuition tax credits to be applied toward the education of private and religious school students anywhere in the state.

BEST COPY AVAILABLE

VOUCHER STUDY'S PRESS REMINISCENT OF 'DEWEY DEFEATS TRUMAN'

Marc Egan, Director, NSBA Voucher Strategy Center

In the weeks leading up to Election Day, headlines in major newspapers across the nation proclaimed the news: 'Study Shows Vouchers Help African-American Students.' But much like the Chicago Tribune's infamous 'Dewey Defeats Truman' banner headline in 1948, the public later discovered the call had been made a bit hastily.

To recap: Harvard University Professor Paul Peterson, the lead researcher of a study on three privately-financed voucher programs, reported that African-American students who used vouchers showed significant gains in standardized test scores after two years. His findings, released in a conference paper, generated national attention and favorable press for the voucher movement.

Although the report actually cautioned against drawing policy conclusions based on the short-term look at three small pilot programs, that didn't stop Peterson and voucher proponents from publicly implying that vouchers could eliminate the test score gap between African-American and white students. "Move forward with voucher experiments" was the understood message. In addition, voucher supporters, including those campaigning for a statewide voucher program in California and Michigan, jumped at the news, claiming vouchers' effectiveness had been clearly proven.

But the wheels soon fell off the voucher study bandwagon when a respected national policy research company that gathered and analyzed the data for one of the cities examined in the study, went public and called Peterson's reported findings "premature." The company stated that in that city there was, in fact, no significant gain in overall test scores for students who had used vouchers. Only African-American students in one grade had shown any improvements, while African-American voucher students in all other grades showed no gains. Likewise, students of other races and ethnicities showed no academic gains whatsoever.

"Because the gains are so concentrated in this single group, one needs to be very cautious in setting policy based on the overall modest impacts on test scores," said David Myers, a lead investigator of the study. "We really need to learn why this group stands out so much. Until we understand this better, we cannot place much policy weight on it."

Myers' warnings and the subsequent press it received did quell some of the euphoric cheers of voucher supporters, though reference to the Peterson study as viable evidence vouchers work continued to some degree.

In many ways, Peterson's public and "premature" claims should not be entirely surprising. His findings did not apparently undergo the rigorous peer review typical of many research studies, nor did he seem willing to acquiesce to multiple requests from academics to publicly release his data. And, he released his chosen findings on a politically and publicly contentious issue at a time when voters were being asked to make significant decisions on vouchers.

. . . scant evidence exists to suggest vouchers have significantly raised the academic performance of students.

Peterson's support for school vouchers and an expansion of voucher programs is no secret. "I would like to see us try it out on a larger scale," he said in a PBS *Frontline* interview. "Let's try some programs out on a large scale. The voucher option looks like it might have benefits . . . . It has no downside."

Furthermore, his study was funded by a stable of pro-voucher organizations, including the Thomas B. Fordham Foundation and the Milton and Rose D. Friedman Foundation. Milton Friedman is known as the father of the school voucher movement, having advocated the concept more than 30 years ago.

Aside from the disputed academic findings of the study, some relevant and undisputed information never made it into the headlines. For example, a large number of students – 47 percent in Washington, DC and 46 percent in Dayton, OH – who were offered vouchers through the privately-funded programs did not even use them. Parents of the declining students most often cited high costs beyond the amount of the voucher and lack of space in private schools as common reasons the vouchers went unused.

Behind the rhetoric that accompanies the school voucher debate, scant evidence exists to suggest that vouchers have significantly raised the academic performance of students. Past studies of Milwaukee's and Cleveland's voucher programs show little, if any, progress toward student achievement. NSBA's recent policy brief on voucher studies discusses the evidence available. It can be read in its entirety at http://www.nsba.org/research-briefs.

The election-year release of select research findings by Peterson and the subsequent debunking of his claims can be considered instructive for the public and policymakers who are making decisions about such a critical issue. It is reasonable to believe that the public would not stand for significant policy decisions to be made on the basis of incomplete research on health or safety programs for children – they should not stand for it with education either.

For more information on vouchers, visit the School Voucher Clearinghouse at http://www.nsba.org/advocacy/index.htm

For the Board— CYBER-SUSPENSIONS: CAN SCHOOLS DISCIPLINE STUDENTS FOR THEIR WEB SITES?

Julie Underwood, General Counsel, National School Boards Association

Wait! Before you expel that student for an offensive Web site, consider the following key questions raised in recent court cases: Was the Web site created on or with the use of school property? Is the language used threatening to school personnel or otherwise capable of disrupting or impeding school operations? If you answer "no" to both of these questions, you may want to reconsider your decision. But, if you can answer "yes" to at least one of the two questions, proceed with caution as you consider the outcomes of the following cases. Note that in the following examples, the Web site or Internet communication originated from home, not from the school computer.

1. A student's Web site contained his (not too flattering) opinions of the school and its administration. The student was suspended for 10 days. The principal testified that he disciplined the student because he was upset by the contents of the page – not because he believed it would cause any disruption within the school. A federal court overturned the student's suspension. *Beussink v. Woodland R-IV*, 30 F. Supp.2d 1175 (E.D. Mo. 1998).

2. A student's Web site contained mock "obituaries" of at least two of his friends, apparently inspired by a creative writing class in which student wrote their own obituaries. Visitors to the Web site were asked to vote on who would "die" next – that is, who would be the subject of the next mock obituary. The student was suspended for 5 days. A federal court overturned the student's suspension, finding that the speech was not intended to, nor did it actually, threaten anyone or manifest any violent tendencies. *Emmett v. Kent School District No. 415*, 92 F. Supp. 2d 1088 (W.D. Wash. 2000). The district ultimately settled this case, agreeing to pay the student $1 in damages and $6,000 for his legal fees and to expunge the suspension from his student record.

3. A student's Web site contained derogatory comments about his math teacher and school principal. The Web site described the math teacher in profane terms, contained a picture of her severed head dripping with blood, a picture of her face morphing into Hitler and a solicitation for funds to hire a hit man to kill her. The math teacher suffered from anxiety after learning of the Web site and subsequently missed the remainder of the school year. The student was permanently expelled from school. A Pennsylvania appellate court upheld the expulsion, finding that the speech constituted a threat against the teacher which materially interfered with the educational process of the school. *J.S. v. Bethlehem Area School District*, 757 A.2d 412 (Pa. Commw. Ct. 2000).

4. A student's Web site was dedicated to mocking his principal, including pictures of him having sex with Homer Simpson, sodomizing a pig and with his head superimposed onto an advertisement for Viagra. The school expelled the student but allowed him to return the following year and graduate in the spring. The student sued the district with the help of the American Civil Liberties Union.

   Superior Court Judge Thomas McPhee ruled in his favor. Using *Tinker*, *Kuhlmeier*, and *Fraser* as the basis for its analysis, the court found that the student's Internet speech was protected by the First Amendment. According to the court, the school failed to demonstrate that the speech caused "material and substantial disruption of the work or discipline of the school." In addition, the Internet speech was neither "an on-campus activity," nor did it fall within the "fighting words" defamation exception to the First Amendment. *Beidler v. North Thurston School District*, No. 99-00236 (Wash. Super. Ct. July 18, 2000).

Thus, the issue really isn't technology at all; the issue is the school's authority to discipline students for off-campus behavior. The bottom line is that schools have no authority to discipline a student for off-campus behavior unless that behavior has a connection to the school. To punish a student for off-campus speech, the school must show that the speech caused a substantial disruption at school (or it is reasonable to believe that such a disruption would occur) or presents an on-campus danger. For schools to discipline speech that is merely lewd or vulgar, it must be in-school speech or, as noted in *Beidler*, speech facilitated by the use of school property. So far, the courts have not found the posting of information on the Internet to be in school speech.

Here are some alternatives to disciplining students that avoid potential legal risks and expenses:

- Inform the Internet Service Provider which hosts the Web site about the offensive pages. The ISP can then act to remove the site if it violates its own terms of service and community standards. The school gets what it wants without the risk of the lawsuit.
- Contact the student's parents and let them know what is coming out of their home computer. Parents may remove the offensive pages and deny their child computer privileges.

Although it may be difficult sometimes, schools should remember their obligation to teach students their constitutional rights and responsibilities. As one judge explained:

> Indeed, it is provocative and challenging speech, like Beussink's, which is most in need of the protections of the First Amendment. . . . Speech within the school that substantially interferes with school discipline may be limited. Individual student speech which is unpopular but does not substantially interfere with school discipline is entitled to protection. The public interest is not only served by allowing Beussink's message to be free from censure, but also by giving the students at Woodland High School an opportunity to see the protections of the United States Constitution and the Bill of Rights at work.

Beussink, 30 F.Supp.2d at 1181.

©2000, National School Boards Association, 1680 Duke Street, Alexandria, Virginia, 22314-3493. www.nsba.org/cosa

Permission to reprint this page is granted to Council of School Attorneys' members for distribution to their school board clients.

FACILITIES USE

BOY SCOUTS

The Supreme Court's ruling in *Boy Scouts of America v. Dale*, 120 S.Ct. 2446 (2000), has raised questions in the school community as to whether the Boy Scouts should be allowed to use school facilities. The concern has been that by granting the Scouts access to their facilities, schools might be perceived as promoting, facilitating or condoning the group's anti-homosexual philosophy. In *Dale*, the Supreme Court said that the Scouts are entitled, under the First Amendment, to hold this view and cannot be forced to accept an openly gay man as a Scout leader under a state statute prohibiting discrimination based on sexual orientation. The Court said that even the state's interest in eliminating the destructive effects of anti-gay discrimination would not justify such a severe intrusion on the group's freedom of association.

But even if the Boy Scouts have a constitutional right to exclude gays from leadership positions, does this mean that school districts must allow them to use school facilities to conduct their activities?

Evenhanded treatment of outside groups will help ensure that schools are not perceived as endorsing or sanctioning any group's message or philosophy.

Under the First Amendment, schools must continue to treat requests by the Boy Scouts to use school facilities after hours as they would any other community group's request. This means schools must examine state law or school policies which specifically control the public's right to use school facilities. If by policy or practice the school has created a limited public forum open to a wide variety of community uses, it may impose reasonable time, place and manner restrictions. However, it must remain viewpoint neutral. *Lamb's Chapel v. Center Moriches School Dist.*, 508 U.S. 384 (1993). *Lamb's Chapel* made it clear that if expression on a particular subject is permitted in the forum, the school cannot exclude speech on that subject based on its viewpoint, religious or otherwise. In the case of the Boy Scouts, what is at issue is the First Amendment right of association and not necessarily any expression that might actually take place during scouting activities on school grounds. Assuming a school district could require outside groups seeking access to have non-discriminatory membership/leadership policies consistent with its own policies, it would have to apply this condition of use to all groups requesting use of school facilities and not just to the Scouts.

Compare Hsu v. Roslyn Union Free School Dist No. 3, 85 F.3d 839 (2d Cir.), *cert. denied*, 519 U.S. 1040 (1996) (under Equal Access Act school district must allow student religious group to use school facilities even though club's requirement that officers be Christians violated school policy prohibiting all student groups from discriminating on the basis of (among other things) religion); *with Lloyd v. Grella*, 611 N.Y.S.2d 799 (N.Y. Ct. App. 1994) (school board resolution prohibiting any employer, including the military, that discriminates on the basis of (among other things) sexual orientation from recruiting students on campus is a valid exercise of board discretion; policy was not invalidated by statute granting military recruiters access "on the same basis" as other employers).

Evenhanded treatment of outside groups will help ensure that schools are not perceived as endorsing or sanctioning any group's message or philosophy. In *Sherman v. Consolidated School District 21*, 8 F.3d 1160 (7th Cir. 1993), an atheist parent and student contended that the school district violated the Establishment Clause by allowing the Boy Scouts to use its facilities and to distribute and post announcements at school about the group's activities. The court rejected this argument, noting that all youth organizations are afforded the same status under the district's facilities use policy and are treated evenhandedly. The court said under such circumstances, the Boy Scouts could not be deemed to be "school connected" or to be receiving preferential treatment. The court used a similar analysis in finding that the district's literature distribution policy and practices met constitutional standards, noting no "special attention" is drawn to any organization's meetings or activities.

Attribution of the group's beliefs to the school district may also raise equal protection claims or assertion of non-compliance with state anti-discrimination laws. The court's analysis in *Sherman* provides helpful insight on how to resolve these issues. The court pointed again to the uniform treatment of groups as its basis for finding no equal protection problem. Citing *Gilmore v. City of Montgomery*, 417 U.S. 556, 574 (1974), the court declared that "only if the government were to 'ration' facilities in favor of [discriminatory] groups, or were to provide additional benefits to such groups, would a constitutional violation arise."

The court held that the school district could not be liable for an equal protection violation, and then examined whether the Boy Scouts could be considered a "state actor" for Fourteenth Amendment purposes. The court discussed four situations in which state involvement in private discriminatory activity is so significant that it may be deemed to constitute state action: 1)when there is a symbiotic relationship between the private actor and the state; 2) where the discrimination is aggravated in some unique way by the involvement of governmental authority; 3) when the state has commanded or encouraged the private discriminatory action; and 4)when the private actor carries on a traditional state function. The relationship between Boy Scouts troops and schools varies , so applying these factors can help determine whether the circumstances in a particular school district may raise some discrimination concerns.

■

RELIGIOUS CLUBS

The Supreme Court has accepted for review *Good News Club v. Milford Central School*, 202 F.3d 502 (2d Cir. 2000). The Court will decide whether a public school district may exclude a club that offers religious instruction and prayer for elementary school children from using school facilities after hours. The district's policy allows district residents to use the facilities for "holding social, civic, and recreational meetings and entertainment events and other uses pertaining to the welfare of the community." The policy specifically excludes any use for religious purposes as required by state law. The Second Circuit found that the exclusion was a reasonable content restriction and not impermissible viewpoint discrimination. The appellate court rejected the club's contention that it, like other clubs permitted to use facilities, would teach moral values, only from a Christian perspective. The court found that the club's activities are not just moral instruction, but focus on "teaching children how to cultivate their relationship with God through Jesus Christ," which the court characterized as "quintessentially religious."

The club has asked the High Court to determine if, the policy has led to viewpoint discrimination against religious speech and excessive government entanglement. Under the policy, school officials are required to determine whether proposed speech is discussion of morals from a religious viewpoint (permissible) or religious instruction (impermissible).

Federal News

EEOC ISSUES COMPLIANCE GUIDANCE ON EMPLOYEE BENEFITS

In October the Equal Employment Opportunity Commission (EEOC) issued a new chapter on employee benefits as part of its project to update its entire compliance manual. This chapter covers such benefits as life insurance, health insurance, long-term disability benefits, disability retirement benefits, pensions and early retirement incentives. It discusses discrimination in these benefits under the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA), Title VII of the Civil Rights Act of 1964 and the Equal Pay Act (EPA). This new compliance chapter supercedes several EEOC policy documents on related subjects.

Equal Cost/Equal Benefit

The bulk of the chapter covers the application of the ADEA to employee benefits. It explains the circumstances under which an employer may provide different benefits to older workers versus younger workers. Under the equal cost/equal benefit rule an employer can avoid an ADEA violation by providing equal benefits to older and younger workers OR by spending the same amount of money to purchase benefits, even if the benefits are not equal. However, employers can use the equal cost defense only if: 1) the benefit is one that becomes more expensive as people age; 2) the benefit is part of a benefit plan that requires the reduction of benefits as employees get older; 3) the employer has spent an equal amount for each employee, regardless of age; and 4) the employer has reduced the benefit for older workers only as much as is necessary to equalize the cost of the benefit for each worker. Special rules apply to health insurance benefits and to long-term disability benefits.

Offsets

The ADEA also authorizes employers to offset, from certain benefits, other benefits older workers receive. The ADEA permits three types of offsets: 1) deduction of certain pension benefits from long-term disability benefits; 2) deduction of certain retiree health benefits, or extra pension benefits, from severance pay; and 3) deduction of certain amounts from pension benefit accruals if the employee either works past normal retirement age or begins to receive pension payments while s/he is still working.

Early Retirement Incentive Programs

The ADEA does permit the employer to offer early retirement incentive programs as long as participation is voluntary and the plan is non-discriminatory. The employer does not necessarily have to provide equal early retirement benefits to all employees, regardless of age. For example, an employer may offer to eliminate the reduction that it would normally make when an employee retires before normal retirement age. This would benefit younger workers more because they would receive a greater reduction than would otherwise apply. The ADEA also permits employers to offer Social Security supplements to employees who retire before they are eligible for Social Security and allows age-based reductions in early retirement benefits provided to tenured faculty by colleges and universities. In the EEOC's view, the ADEA does not otherwise permit employers to reduce or terminate early retirement benefits to older workers based on their age.

Continued on page 8

Chairman's Notes

2001 SCHOOL LAW SEMINAR - HYATT REGENCY SAN DIEGO

If you haven't already reserved a hotel room in San Diego, CA for the 2001 School Law Seminar and you plan to attend, we suggest you reserve a hotel room today. Hotel information is located on NSBA's Web site at http://www.nsba.org/conference/hotel/index.htm. Unfortunately, the Hyatt Regency sold out very quickly, but NSBA has blocked rooms in over 40 San Diego hotels, so if you act quickly, you still have a number of good choices. Check the Council's Web site for complete program information.

COUNCIL BOARD HOLDS ANNUAL PLANNING RETREAT

The Council of School Attorneys' Board of Directors held its annual planning meeting in Litchfield Park, AZ on October 12, 2000 just prior to the 2000 Advocacy Seminar. Four major issues were on the agenda: 1) adoption of revised long range goals and implementation strategies for the Council program; 2) review of the Council's Bylaws; 3) adoption of a dues adjustment schedule; and 4) adoption of strategies developed by the Membership Committee to increase membership by increasing the number of affiliated state councils and marketing individual memberships. An abbreviated version of the mission and goals appears on page 7. For a complete copy of the document including "strategies" contact Susan Butler at sbutler@nsba.org.

Once the mission and goals document was adopted, the Board reviewed the recommendations of the Ad Hoc Committee on Bylaws chaired by Margaret Chidester. The Board passed several amendments to the Bylaws that will be presented to the membership for ratification at the annual meeting on Saturday, March 24, 2001 in San Diego, CA. The amendments are on page 7.

The Board voted to continue the current dues adjustment schedule for affiliated state councils which increases dues $10 per member every other year. Members in affiliated states paying on the January cycle will pay $130 for calendar year 2001. Members in affiliated states paying on the July cycle will pay $130 for FY 2001-2002. They also voted to increase individual membership dues to $145 immediately and to increase the difference between individual and affiliated state dues to $25 or more to encourage states to form state councils and affiliate with NSBA.

Continued on page 7

Chairman's Notes continued

REVISED MISSION & GOALS

The mission of the NSBA Council of School Attorneys is to support school attorneys in their representation of public school boards by providing leadership in legal advocacy for public schools.

Its programs and services are designed to:

- assist NSBA and its Federation Members and school attorney members in developing preventive law practices and programs;
- facilitate the continuing legal education of school attorneys; and
- create a national forum for school attorneys to exchange information on the complex legal problems confronting local public schools.

Underpinning COSA's mission are four (4) goals and supporting strategies.

- Continue COSA's leadership role as the nationally-recognized educator and authority on school law
- Expand COSA membership to all attorneys representing school districts
- Insure COSA's long-term financial and organizational stability
- Provide networking and information sharing opportunities to specialized member constituencies

AMENDMENTS TO COUNCIL BYLAWS ADOPTED

These amendments to NSBA Council of School Attorneys' Bylaws adopted on October 12, 2000 by the Council Board of Directors are effective pending approval by the membership. A complete copy of the Bylaws can be found on the Council's Web site at http://www.nsba.org/cosa/About/bylaws.htm

(Deleted language is in ~~strikeout~~ format. New language is underlined.)

ARTICLE I - ESTABLISHMENT

Pursuant to Article XVI of the Constitution & Bylaws of the National School Boards Association (hereinafter referred to as the "NSBA"), a Council of School Attorneys (hereinafter referred to as the "Council") is hereby created. The Council shall be organized and operated in accordance with these bylaws and the Constitution & Bylaws of the NSBA.

ARTICLE II - PURPOSES

The mission of the NSBA Council of School Attorneys is to support school attorneys in their representation of public school boards by providing leadership in legal advocacy for public schools.

The purposes of the Council are:

a) To provide a national forum for the discussion of legal issues and problems encountered by school attorneys in providing legal counsel, advice, and representation to school boards and school board associations;

b) To promote and develop a closer relationship and better understanding between school attorneys and their clients, school boards and school board associations;

c) To provide a means by which school attorneys can advocate ~~participate actively as a professional group in educational dialogue on a national level under the aegis of the NSBA~~ on behalf of public schools; and

d) To be the leader and nationally recognized educator and authority on school law.

(No changes adopted for Article III - Membership.)

ARTICLE IV - GOVERNING AUTHORITY

Section 1. Officers

~~The membership of the Council shall elect the following officers at each annual meeting:~~ The officers of the Council shall be as follows:

a) Chairperson - presides at all meetings of the Council and Council Board of Directors and shall be *ex-officio* member of the Board of Directors of the NSBA. No member of the Council shall serve more than two (2) terms in the office of Council Chairperson.

b) ~~First Vice~~ Chairperson-Elect - assumes the duties of the Chairperson in the absence of or at the request of the Chairperson, and automatically becomes chairperson at the next annul meeting.

c) ~~Second~~ Vice-Chairperson - performs such duties as assigned by the Chairperson.

d) (d) ~~Recording~~ Secretary - maintains the ~~journal of~~ proceedings of the Council and fulfills the other usual functions of such office.

Election of Officers - At each annual meeting of the Council, the membership shall elect the Chairperson-Elect, the Vice Chairperson and the Secretary.

Meetings of Officers - Officers may meet, at the call of the Chairperson, during the interim between meetings of the Council Board of Directors and shall have such powers of the board between meetings of the board as provided by resolution of the Council Board of Directors.

(No changes adopted for Section 2 through Section 4.)

Section 5. Nominating Committee

The nominating committee shall consist of the chairperson and the three most recent past chairpersons of the Council. The nominating committee shall prepare a slate of nominees for Chairperson-Elect, Vice Chairperson and Secretary ~~each Officer position~~ and the Director-at-Large positions which will become vacant at the annual meeting. The committee shall maintain a wide geographical and diverse representation on the Council Board of Directors to ensure that the professional interests and concerns of all members throughout the United States are represented. The committee shall ascertain the availability and commitment of each person to serve prior to making its report at the annual meeting of the Council. ~~Nominations for each position may also be made from the floor at the annual meeting of the Council.~~ No nominations will be accepted from the floor.

Nominations from the membership must be submitted in writing over the signature of 10 members and be delivered to the Chairperson at the NSBA headquarters no less than 30 days prior to the annual meeting of the Council.

Section 6. Powers and Duties of the Board of Directors

The Council Board of Directors shall have full authority and responsibility to conduct the business of the Council between annual meetings of the membership of the Council. It shall specifically have authority to fix membership fees and other charges, amend these bylaws as set forth in Article VII, fill vacancies in Officer positions, and take all other actions necessary or convenient to the management of the affairs of the Council. The Council Board of Directors shall review and recommend ~~adopt a~~ Council budget for each fiscal year during the annual Council meeting. ~~convention of the NSBA.~~

(No changes adopted for Section 7, Article V.)

ARTICLE VI - MEETINGS

(No changes adopted for Sections 1 & 2)

Section 3. Quorum

The following quorum requirements shall apply:

(a) Annual Meeting - Those members in good standing who attend the annual meeting of the Council shall constitute a quorum for the purposes of electing Officers and Directors-at-Large of the Council Board of Directors and for transacting other business of the Council requiring a vote of the membership. Members shall not be permitted to vote by proxy.

(b) Council Board of Directors - Ten (10) voting members of the Council Board of Directors shall constitute a quorum, provided that the Council Board of Directors may act by mail ballot or poll conducted by telephone. All members of the Council Board of Directors shall be given notice and a reasonable opportunity to respond to polls and mail ballots. No action shall be taken pursuant to a poll or mail ballot unless at least ten (10) voting members of the Council Board of Directors respond. Members shall not be permitted to vote by proxy.

(No changes adopted for Article VII or VIII.)

BEST COPY AVAILABLE

Federal News- continued from page 6

Pensions

According to the EEOC, employers have flexibility in designing their pension plans. They may set normal and/or early retirement age limits for the receipt of benefits; require a certain number of years of service, or a certain time period, before an employee is eligible to retire, and set limits on the total amount of benefits provided by the plan. In the EEOC's view an employer may not stop or reduce accruals in, or contributions to, an employee's pension benefits based on the employee's age. The agency's guidance says that an employer also may not exclude an employee from participating in the plan simply because the employee is close to the plan's normal retirement age when hired.

Americans with Disabilities Act

According to the EEOC, employers may not make any disability-based distinctions in employee benefits that they cannot justify. The law allows distinctions justified by actuarial data, or distinctions necessary to avoid prohibitive increases in premiums for other employees. The ADA does not require that disability retirement and service retirement plans provide the same benefits. However, all employees must be able to participate in the service retirement plan on the same terms, regardless of a disability.

Title VII/EPA

Employers cannot take sex, race, color, national origin, or religion into account in their benefit programs. With respect to health plans, if the employer has excluded a treatment for a condition that only, or disproportionately, affects members of one sex, race or protected group, it must be able to show that the exclusion resulted from a neutrally applied standard based on generally accepted medical criteria.

The entire benefits compliance chapter is available on the EEOC Web site at http://www.eeoc.gov/docs/benefits.html

■

The Council publishes more information on federal legislative and administrative agency activities affecting public schools at http://www.nsba.org/cosa/

National School Boards Association
1680 Duke Street
Alexandria, VA 22314-3493